Supreme Court, U.S.
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No.

In The
Supreme Court of The United States
October Term 1997

CALLAWAY COUNTY
AMBULANCE DISTRICT
Petitioner,

v.

CHRISTINA PEEPER
Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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16 PP

QUESTIONS PRESENTED

I. Whether a United States Court of Appeals may decide a case on constitutional grounds: (1) that were not raised in the complaint in the district court; (2) upon which no evidence was presented at trial; (3) about which no argument was made to the district court in proposed findings of fact and conclusions of law; and, (4) which were not raised on appeal.

II. Whether a public ambulance district may prevent a member of the district's board from participating in, and voting on, certain confidential matters without abridging the board member's first amendment or fourteenth amendment rights where: (1) her husband is a full time employee of the district; (2) her husband is a member of the union authorized to negotiate with the ambulance district for benefits and pay; and, (3) her husband is suing the ambulance district for money damages related to his employment by the ambulance district.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1997

CALLAWAY COUNTY AMBULANCE DISTRICT,
Petitioner

v.

CHRISTINA PEEPER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Callaway County Ambulance District ("the Ambulance District") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 122 F.3d 619 and is set forth in Appendix A. The opinion of the United States District Court for the Western District of Missouri ("the district court") was unreported and the district court's Findings of Fact, Conclusions of Law and Order, and Judgment, are contained in Appendix B. The reported decision of the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") mentions the order denying the suggestion for rehearing en banc and petition for rehearing, by a vote of six to five. The order is set forth in Appendix C.

JURISDICTION

The Eighth Circuit rendered its opinion reversing the decision of the district court in this case on August 19, 1997.

By a vote of six to five, the Eighth Circuit denied the suggestion for rehearing en banc and the petition for rehearing on October 29, 1997. This petition is timely filed pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in this case are set forth in Appendix D:

U.S. CONST. amend. I (1791)
U.S. CONST. amend. XIV, Section 1 (1868)
Mo. Rev. Stat. Section 105.450(5) (1994)
Mo. Rev. Stat. Section 105.452 (1994)
Mo. Rev. Stat. Section 105.476 (1994)
Mo. Rev. Stat. Section 610.021 (1994)

STATEMENT OF THE CASE

Respondent, Christina Peeper, sued the ambulance district in the United States District Court for the Western District of Missouri in July, 1996. Respondent's law suit was filed under 42 U.S.C. Section 1983. Respondent sought injunctive relief, complaining that the ambulance district had violated her right to free exercise of speech under the first amendment of the United States Constitution. She also sought injunctive relief in federal court for violations of state law.

A. Factual Background. The following is a summary of the facts as found by the district court. (Apdx. B - 16 to 22)

Respondent was elected as a member of the ambulance district's board of directors on April 2, 1996, as a write-in candidate who received eight votes. The ambulance district is a political subdivision of the State of Missouri organized pursuant to the provisions of Chapter 190 of the Revised Statutes of Missouri. The ambulance district is a public, tax supported entity that provides ambulance services to the entire Callaway County, Missouri area. The ambulance district is governed by a six member elected board.

Respondent is married to and resides with Joe Peeper, a full-time employee of the ambulance district. Respondent's husband is a supervisor and part of his duties include disciplining other employees.

Owing to such relationship, on April 23, 1996, (at the Respondent's first board meeting as an ambulance district board member), a resolution (Resolution No. 1) was passed restricting involvement of Respondent in specified board activities. The ambulance district board operated under this resolution for the April 23, 1996 meeting, only.

Respondent, through her attorney, contacted the ambulance district and expressed several concerns regarding Resolution No. 1. Respondent urged that no resolution was required because enforcement of Missouri conflict-of-interest laws was delegated to the State of Missouri attorney general, because certain board functions from which Respondent was excluded could not properly be kept confidential under the provisions of Chapter 610 of the Revised Statutes of

Missouri, (the open meetings statute), because Resolution No. 1 was broader than permitted under the conflict-of-interest law, and because Respondent had been prohibited from discussing certain matters of district-wide interest.

Respondent's concerns regarding Resolution No. 1 resulted in a scheduled discussion of such resolution at the ambulance district's May 28, 1996 meeting. During the May 28, 1996 meeting, there was an extended discussion concerning Respondent's presence during certain closed sessions of the ambulance district's board meetings. The ambulance district rejected Respondent's suggestion that no resolution be adopted. The ambulance district passed and adopted a superseding resolution at its May 28, 1996 meeting, (Resolution No. 2), and rescinded Resolution No. 1. (Resolution No. 2 is set forth in Appendix E.) The ambulance district operated under Resolution No. 2 thereafter.

The Respondent actively participated at the April 23, 1996 meeting. She seconded two motions and was present during a closed session while a salary increase for the executive director of the ambulance district was discussed. Respondent actively participated at the May 28, 1996 meeting of the ambulance district. She made a motion, seconded another motion, and addressed the board during the employee and visitor comment portion of the meeting. Respondent's husband also addressed the ambulance district board during that portion of the same meeting to express his disagreement with a board decision to change the schedule of hours worked

by employees of the ambulance district. Further, Respondent was not entirely precluded from participating during a June 11, 1996, meeting of the ambulance district she attended.

The ambulance district was facing several issues at the time of passage of both Resolution No. 1 and Resolution No. 2. In early 1996, a lawsuit was threatened concerning overtime wages claimed to be due the employees. The suit was was filed thereafter and Respondent's husband is a plaintiff therein. A petition was filed with the Missouri State Board of Mediation attempting to organize employees of the ambulance district into a collective bargaining unit. The Missouri State Council of Firefighters sought to include Respondent's husband in the bargaining unit and he was subsequently included in the bargaining unit. The ambulance district at its April 23, 1996, meeting voted to change the hours worked by its employees, an issue that had been pending before the board since 1994. All three of these issues financially affected Respondent's husband.

Respondent's interpretation of the Missouri conflict of interest law is such that she deems it prohibits her from discussing only those matters that specifically address her husband by name. Given the opportunity, Respondent will attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization, litigation by her husband against the ambulance district, and determination of hours worked by employees (including her husband).

B. Proceedings Below. The district court conducted a non-jury trial. The district court ruled in favor of the ambulance district and against Respondent. The court held any issue regarding Resolution No. 1 was made moot by the passage of Resolution No. 2. The court found Resolution No. 2 to be content-neutral, citing Ward v. Rock Against Racism, 491 US 781 (1989). Likewise, the district court found Resolution No. 2 to be narrowly tailored to advance the compelling governmental interests of preventing the appearance of government corruption and promoting the effective functioning of government, citing Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 US 37 (1983) and Buckley v. Valeo, 424 US 1 (1976). Accordingly, the district court found passage and enforcement of Resolution No. 2 did not compromise Respondent's right to freedom of speech under the first amendment, the only federal constitutional right alleged by Respondent to have been abridged by Resolution No. 2.

The Eighth Circuit reversed the decision of the district court in a decision reported at 122 F.3d 619 (8th Cir. 1997). The Eighth Circuit decided that Resolution No. 2 violated Respondent's first amendment associational rights and fourteenth amendment equal protection rights. Neither of these grounds was asserted or argued by Respondent in the district court or on appeal. By a vote of six to five, the Eighth Circuit denied the ambulance district's suggestion for rehearing en banc and petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The action of the Eighth Circuit in deciding the case on the basis of issues not presented to it or to the trial court so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers of the federal judicial system.

The Eighth Circuit found:

> The resolution's provisions injure Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. The resolution creates a standard specific to Peeper that treats her differently than the other Board members, strongly implicating her Fourteenth Amendment equal protection rights. The restrictions also restrain Peeper's interaction with other board members, implicating her First Amendment associational rights.

The Respondent never asserted that Resolution No. 2 violated her first amendment associational rights or her fourteenth amendment equal protection rights. Respondent complained that Resolution No. 2 interfered with her speech

rights under the first amendment. In her Complaint, Respondent mentioned the fourteenth amendment only in the context of the fourteenth amendment making her first amendment speech guarantee applicable to the ambulance district as a political subdivision of the State of Missouri. The case was tried on the issues framed by the pleadings of Respondent.

Respondent filed a trial brief in support of her motion for preliminary injunction. The trial brief made no mention of first amendment associational rights or fourteenth amendment equal protection rights. The district court issued Findings of Fact, Conclusions of Law, and Order, and entered Judgment for the ambulance district based on the issues presented to it.

Respondent filed an Appellant's Form A with the Eighth Circuit which listed the issues on appeal. The three issues listed on Appellant's Form A are based on purported violations of her speech rights under the first amendment. Respondent's brief to the Eighth Circuit likewise shows that the issues in this lawsuit, as raised by Respondent, are whether Resolution No. 2 violated her speech rights under the first amendment. Likewise, Respondent's reply brief to the Eighth Circuit contained no mention of first amendment associational or fourteenth amendment equal protection rights. The ambulance district, and the district court, tried this case based on the pleadings filed and the arguments asserted by Respondent. Following the usual federal practice,

the ambulance district briefed and argued this appeal based on the arguments and issues advanced by Respondent. Respondent has never so much as mentioned a violation of her associational rights under the first amendment or equal protection rights under the fourteenth amendment. The Eighth Circuit reversed the district court ruling based on issues never presented to, nor considered by, the district court. That decision is contrary to the rule of law.

It has long been the practice in the federal judicial system that courts of appeal will not consider issues not raised below. One of the leading cases standing for this proposition is Hormel v. Helvering, 312 U.S. 552 (1941). In that case, the Commissioner of Internal Revenue argued on appeal that trust income received by the petitioner was taxable under a section of the internal revenue code that was different than the sections argued before the Board of Tax Appeals. This Court stated the general rule that "an appellate court does not give consideration to issues not raised below." Hormel, at 556. The Court further held that deviation from the ordinary practice should not occur unless "the obvious result would be a plain miscarriage of justice." Hormel, at 558.

This Court in C.I.R. v. McCoy, 484 U.S. 3 (1987), another tax case, implied that the general rule was much more far-reaching. The Court stated that federal courts of appeal have jurisdiction to review decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. McCoy, at

6. The instant case is a civil action which was tried to the district court without a jury. The McCoy decision stated that the duty of the court of appeals in reviewing the decisions of the Tax Court or the district court in a civil action without a jury is to consider whether error was committed. Id. The court went on to hold that the consideration of matters that were not the subject of the proceeding in the Tax Court is in excess of the jurisdiction of the court of appeals. This Court thereby suggested that the court of appeals likewise exceeds its jurisdiction when it considers matters not raised at trial. Id.

This rule of law is not limited to tax cases. In Singleton v. Wulff, 428 U.S. 106 (1976), the court emphasized that deviation from the ordinary practice of refusing to consider issues not raised in the trial court is limited to cases such as those "where the proper resolution is beyond any doubt" or where "injustice might otherwise result". Singleton, at 121. (citations omitted). In Singleton, the case was dismissed by the district court for lack of standing. The court of appeals reversed on the standing issue and went further to review the case on the merits, which had obviously not been presented when the case was dismissed in the district court. This Court reversed the court of appeals. The Singleton decision, quoting Hormel, supra, stated the rationale for the rule that a federal appellate court does not consider an issue not passed upon below: "[It is] essential in order that parties may have the opportunity to offer all the

evidence they believe relevant to the issues . . . and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Singleton at 120. The court went on to explain that it is not for an appellate court to surmise as to what that evidence may have been and stated that in addition to evidence, the litigant should have the opportunity to present whatever legal arguments the party desire at the district court level. Id.

The Eighth Circuit, following the lead of this Court, has maintained the same practice. In Morrow v. Greyhound Lines, Inc., 541 F.3d at 713 (8th Cir. 1976), Greyhound asserted trial court error because of wrongful admission of expert testimony. The Eighth Circuit, noting the asserted error was different from the basis upon which appellant had objected at trial, and that Greyhound had not raised the purported error in its motion for new trial, refused to consider the error on appeal. Morrow, 541 F.2d at 723-24. In Thelen Oil Co., Inc. v. Fina Oil & Chemical Co., 962 F.2d 821 (8th Cir. 1992), Fina claimed for the first time on appeal that Thelen's claim was barred by the doctrine of laches. The Eighth Circuit declined to consider Fina's laches defense because it was not raised in the trial court. Thelen, 962 F.2d at 823. Similarly, in Myers v. ANR Pipeline Co., 959 F.2d 1443 (8th Cir. 1992), appellant E-CON argued that its contractual indemnification of ANR was not in effect on the date of the accident that gave rise to the suit. E-CON did not

raise the argument in the trial court and the Eighth Circuit refused to allow E-CON to do so on appeal, stating, "[t]his is not one of those extraordinary cases" in which a "plain miscarriage of justice" would result or the result "would be inconsistent with substantial justice" if the Eighth Circuit refused to consider an argument on appeal that was not raised at trial. Myers, 959 F.2d at 1448.

Morrow makes it clear that it is unjust in the ordinary case (such as this) to allow a party to raise an issue on appeal that was not presented to the trial court. It is no less unjust, and the rationale behind the rule is done no less a disservice, when the Eighth Circuit, sua sponte, decides a case on issues not presented in the district court or, for that matter, to the Eighth Circuit. The Eighth Circuit has recognized as much. In Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993), a suit based on common law fraud, the Eighth Circuit's examination of the case revealed that the trial court committed the basic error of improperly applying a "clear and convincing" standard for plaintiffs' burden of proof when Nebraska law required proof by only a preponderance of the evidence. "However, plaintiffs neither questioned the application of the clear and convincing evidentiary standard in the district court nor raised the issue" on appeal to the Eighth Circuit. Nolte, 994 F.2d at 1315. Because the evidentiary standard was not called to the district court's attention and the trial judge was not given an opportunity to consider the issue, the Eighth Circuit, citing Morrow, refused to consider the issue. Id.

Neither the trial court nor the ambulance district was given the opportunity to address Respondent's associational or equal protection rights. The denial of such opportunity to the trial court and the ambulance district is inconsistent with the long line of cases of which the holdings in Morrow and Hormel are illustrative.

The Eighth Circuit made no "miscarriage of justice" or "resolution beyond any doubt" finding which would justify deciding this case on issues that were not raised in the trial court. Indeed, the Eighth Circuit implicitly found that this was not such a case. The Eighth Circuit found that Resolution No. 2 implicated not only Respondent's first and fourteenth amendment rights, but the constitutional rights of the voters as well. (Apdx. A-10 and 11). However, the Eighth Circuit declined to consider the issue of the voters' rights because Respondent "does not raise the issue". (Apdx. A-11, fn. 5).

The Eighth Circuit became an advocate for Respondent. Rule 10 of the Rules of the Supreme Court of the United States provides that a writ of certiorari is appropriate when "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". This is such a case and the petition should be granted.

II. The decision of the Eighth Circuit is erroneous in that Resolution No. 2 does not infringe upon Respondent's constitutional rights.

The relations between the ambulance district and its employees had deteriorated to the point of antagonism by April 23, 1996, the date of Respondent's first meeting as a member of the ambulance district board and date of passage of Resolution No. 1 governing her conduct while on the ambulance district board.

Three substantial issues confronted the ambulance district board at the time Respondent became a board member. While not inclusive of all situations in which a conflict of interest could arise, they are illustrative of the problems created by the full participation of Respondent in all ambulance district matters.

1) Fair Labor Standards Act Litigation - Suit against the ambulance district was threatened in early 1996 by an employee of the ambulance district. This threat was renewed by the Missouri State Council of Fire Fighters ("MSCFF") on April 22, 1996, regarding back overtime wages purportedly owed by the ambulance district to certain employees. Suit was filed over this issue. Respondent's husband is among the plaintiff-employees seeking monetary relief from the ambulance district.

2) Union Organization - At the same time it threatened the ambulance district with suit, MSCFF informed

the ambulance district that its employees were organizing. Prior to trial of this case, a petition was filed with the Missouri State Board of Mediation seeking to recognize a union for the ambulance district employees. The petition was granted and Respondent's husband is a member of the union.

3) Employee Scheduling - Since at least 1994, the ambulance district had considered changing the hours worked by its employees from 24 to 8 hour shifts. The change was resisted by the employees, but on April 23, 1996, the change was made, and effective July 1,. 1996, all employees, including Respondent's husband, were subject to the new schedule.

It was against this backdrop that the ambulance district adopted Resolution No. 2.

Resolution No. 2 is constitutionally sound under the heightened scrutiny of a content-based regulation. Under such "strict scrutiny", the test is whether Resolution No. 2 advances a compelling interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 U.S. 37 (1983).

A. Resolution No. 2 Advances Compelling Government Interests

Section 105.452 RSMo. provides in relevant part that:

> No elected or appointed official or

employee of the state or any political subdivision thereof shall:

* * *

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse . . .

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse . . . In all such matters such officials must recuse themselves from acting . . .

"Confidential information" is defined as "all information . . . which is of such a nature that it is not, at that time, a matter of public record or public knowledge". Section 105.450(5) RSMo.

At least two of the ambulance district's interests in enforcing Resolution No. 2 have been held to be "compelling": 1) Preventing the appearance of government corruption; and 2) Promoting the effective functioning of government.

The interest in preventing government corruption was held to be compelling in Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985). Preventing the appearance of corruption is equal to the interest in preventing actual corruption; both tend to undermine representative democracy. Buckley v. Valeo, 424 U.S. 1 (1976). The stated purpose of the ambulance district in adopting Resolution No. 2 was to ensure compliance with the State of Missouri Conflict of Interest Law found at Chapter 105, RSMo. The purpose of that law is to prevent government corruption. Compliance with such law is a compelling governmental interest.

Second, promoting the effective functioning of the governmental body is itself a compelling interest. Speech that substantially hinders the functioning of the governmental body may be subject to restriction on that basis. Wrzeski v. City of Madison, Wisc., 558 F.Supp. 664, 668 (W.D. Wisc. 1983). The central commitment of the first amendment is that "debate on public issues should be uninhibited, robust, and wide-open." Bond v. Floyd, 385 U.S. 116, 136 (1966), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). As noted above, the issues about which Respondent

asserts that her "speech" rights have been violated are not public. Rather, these matters are confidential. It is nevertheless important for the ambulance district board members to have "uninhibited, robust, and wide-open" debate on these issues during closed sessions of the board. The presence of Respondent in the room when the board is discussing union representation and overtime wage litigation will severely chill any debate on those issues, as found by the district court. (Apdx. B-21, paragraph 36).

Furthermore, the ambulance district has a compelling interest in maintaining the propriety and fairness of financial matters affecting its employees. Its main revenue source is tax money paid by Callaway County, Missouri property owners. The ambulance district is a trustee of public funds and as such, has a duty to use money appropriately and avoid the appearance of impropriety regarding expenditures. The ambulance district board must be exceedingly sensitive to the effect the husband and wife relationship between board member and employee has on virtually all the ambulance district's financial matters. The presence of an employee's spouse in such confidential meetings and action by her on such issues subverts such propriety and, at minimum, creates the appearance of unfairness to other ambulance district employees and among the general public. These are compelling interests, and have been so adjudicated.

B. Resolution No. 2 is Narrowly Drawn

Resolution No. 2 is "narrowly drawn". Perry, supra. The language of Resolution No. 2 tracks that of the Missouri open meetings statute, Section 610.021, RSMo. Said section defines closed, (and therefore legally confidential), matters:

> (1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys... Legal work product shall be considered a closed record;
>
> * * *
>
> (3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.
>
> * * *
>
> (5) Nonjudicial mental or physical health proceedings involving identifiable

persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

* * *

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

* * *

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

* * *

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions,

salaries and lengths of service of officers and employees of public agencies once they are employed as such;

(14) Records which are protected from disclosure by law;

* * *

Other pertinent language of Resolution No. 2 prevents Respondent from becoming privy to information concerning, or voting upon, ". . . [b]udgetary items involving the compensation, benefits, and pensions paid to employees" and the "hiring, promotion, discipline, compensation, benefits, and pensions of employees..." The foregoing matters could result in financial benefit to Respondent.

The conflict-of-interest statute, Section 105.452, RSMo, prohibits using "confidential" information for personal gain. Such "confidential" information pursuant to the open meeting law (Chapter 610, RSMo) is the only information Respondent is prevented from receiving.

A resolution is narrowly drawn if it represents the "least restrictive alternative" for advancing the interests at stake. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The adoption of Resolution No. 2 as drawn is the least restrictive alternative for advancing the ambulance district's compelling interests. The only way to prevent the appearance

of impropriety and ensure proper functioning of the ambulance district with respect to these issues is to prevent Respondent from being present when they are discussed. Respondent's only proffered alternative is for the ambulance district to do nothing; trust her to keep confidential information confidential; and, hope that evidence of a violation of the conflict of interest law is discovered so that it can be reported to the Missouri Attorney General.

The Eighth Circuit has held that a policy preventing husbands and wives from maintaining an administrator-teacher relationship is constitutionally valid.

> [The] mere existence of a husband-wife/administrator-teacher situation is bound to have a deleterious effect on . . . morale . . . [W]e cannot say that a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary, or capricious. . .This court does not feel that where such definite possibilities of conflict of interest exists, the board should be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take any action. The law should not block legitimate measures taken to anticipate problems and

avert them.

Keckeisen v. Indp. Sch. Dist. 612, 509 F.2d 1062, 1066 (8th Cir. 1975).

The unlikelihood of discovering a violation in these circumstances, when people may be surreptitious and secretive about their dealings is recognized by the case law. The scope of government corruption can never be reliably ascertained. Buckley, at 27. The plaintiffs in Buckley unsuccessfully contended that contribution limits to political campaigns should be invalidated because bribery laws constituted a less restrictive means of dealing with actual and suspected quid pro quo arrangements. "But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts...to influence governmental action." Buckley, at 27, 28.

The adoption of Resolution No. 2 was appropriate in light of the issues facing the ambulance district, the relationship between Respondent and her district employee husband, and the necessity of avoiding conflicts-of-interest while ensuring effective government functioning. Resolution No. 2 meets the "narrowly drawn" test.

C. Resolution No. 2 is Content Neutral and Leaves Open Alternative Channels of Communication

Respondent claimed her first amendment free speech

rights were violated. Her burden of proof involved four separate elements. Clarke v. U.S., 705 F.Supp. 605, 608 (D.D.C. 1988), aff'd by Clarke v. U.S., 886 F.2d 404 (1989); citing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), rehearing denied 438 U.S. 907 (1978). In order to prevail, Respondent first needed to prove her ability to consider and vote on each and every issue to come before the ambulance district was "speech" within the meaning of the first amendment. Second, Respondent had to show the condition placed upon her "speech" by the ambulance district constituted a burden on such speech. Third, she had to show the ambulance district has no legitimate interest in restricting her speech. Finally, Respondent had to prove the ambulance district's interest in restricting her speech did not outweigh the value of the speech restricted. Id.

The restrictions placed on Respondent by Resolution No. 2 do not involve speech dealing with matters of public concern. Instead, they deal with matters that are confidential and closed to the public pursuant to Missouri statute. Section 610.021, RSMo. Hence, the "value" of the "speech" in which Respondent claims first amendment protection is not equivalent to the value of speech on matters of public debate. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

Resolution No. 2 is "content-neutral" as that term is used in first amendment analysis. "The principal inquiry in determining content-neutrality, in speech cases generally ... is whether the governmental regulation of speech... [occurs

because of] ...disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). By her own testimony, Respondent never offered a "message" concerning issues facing the ambulance district, either before or after adoption of Resolution No. 2. Consequently, Resolution No. 2 is content-neutral.

A regulation which is content-neutral, narrowly tailored to serve a significant governmental interest, and which leaves open ample alternative channels of communication, is permissible, despite burdens it may place on speech, as a reasonable time, place, and manner restriction of speech. Ward at 799. The ambulance district's interest in preventing the appearance of corruption and in ensuring the effective functioning of the ambulance district are not only significant, but also "compelling" for purposes of the first amendment. Resolution No. 2 only governs Respondent's participation in certain confidential district business at closed district meetings. Ample alternative channels are left open to Respondent for expressing her views, if any. Respondent is not restricted from actively participating in all confidential closed meetings. Respondent's presence is not restricted at open meetings. Accordingly, Resolution No. 2 imposes reasonable time, place, and manner restrictions on Respondent's speech.

D. Resolution No. 2 Does Not Violate Respondent's Equal Protection or Associational Rights

The Eighth Circuit, relying on Bullock v. Carter, 405 U.S. 134 (1972), held that Respondent's associational and equal protection rights were violated by Resolution No. 2. Bullock recognizes that incidental burdens on office holders are not subject to a stringent standard of review and need only be rationally related to the interests sought to be promoted. Bullock, at 142-143. It is only when the rights of voters are implicated that closer scrutiny is utilized and the burden must be "reasonably necessary to the accomplishment of legitimate state objectives." Bullock, at 144. As noted above, the issue of voters' rights are not present in the instant suit, the Eighth Circuit having refused to consider same because not raised by Respondent.

Although the Eighth Circuit purports to use a "rational" basis for examining the constitutionality of Resolution No. 2, it is clear from a reading of the case that the Eighth Circuit in effect utilized a "reasonably necessary" standard. By focusing on specific provisions of the resolution rather than looking at it in its complete context, the court used a "reasonably necessary" standard. The overall effect of Resolution No. 2 is to prevent Respondent from receiving certain confidential information. Obviously, if Respondent cannot receive information she cannot use it to violate the conflict of interest law. Accordingly, Resolution No. 2 is

rationally related to the ambulance district's legitimate objectives as stated in the resolution and as found by the district court.

The Eighth Circuit completely ignored the dictates of Section 105.476, RSMo, which provides that "nothing in [the conflict-of-interest statute] shall prohibit any political subdivision from establishing additional or more stringent requirements...". The proper focus is whether the ambulance district's goals are furthered by Resolution No. 2, and not whether each specific subsection of Resolution No. 2 precisely, and without deviation therefrom, promotes a corresponding explicit goal or specific subsection of the conflict-of-interest law. Section 105.476, RSMo, recognizes that the goals of the conflict-of-interest law are implicated by an infinite variety of real world situations and that legislation cannot be effectively drafted to cover each such situation. Hence, political subdivisions such as the ambulance district are given the discretion and power to tailor requirements to respond to conflict-of-interest situations in order to further the compelling goals behind the legislation.

Moreover, the Eighth Circuit failed to examine the practical effect of Resolution No. 2. As the district court found, passage of Resolution No. 2 did not prevent Respondent from actively participating in board meetings. (Apdx. B-22 and 23, paragraphs 21 and 23). Resolution No. 2 is the type of de minimis burden to Respondent allowed by Clements v. Fashing, 457 U.S. 957, 972 (1982). "[O]nly

those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause . . . " Clements, at 967.

Resolution No. 2 does not violate Respondent's first amendment speech rights. It is narrowly drawn to promote compelling governmental interests. Resolution No. 2 does not violate Respondent's first amendment associational rights or fourteenth amendment equal protection rights. It is rationally related to legitimate governmental interests. The decision of the Eighth Circuit on these important constitutional issues is erroneous.

CONCLUSION

The petition for a writ of certiorari to the Eighth Circuit should be granted.

Respectfully submitted.

Thomas M. Dunlap
Counsel of Record
Paul J. Stingley
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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION
FILED, AUGUST 19, 1997

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3864

Christina Peeper,	*
Appellant,	*
	*
	* Appeal from the
	* United States
v.	* District Court for
	* the Western
	* District of
Callaway County	* Missouri.
Ambulance District,	*
a political	*
subdivision of	*
the State of	*
Missouri	*
Appellee.	*

Submitted: May 21, 1997
Filed: August 19, 1997

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

Appellant, Christina Peeper, sought injunctive relief from a resolution of, a county ambulance district board of directors limiting her participation as a member of that board because of her marriage to an employee of the ambulance district. The district court denied Peeper's motion, holding that the resolution was narrowly drawn. to meet significant state interests. We reverse.

In April 1996, Peeper became a member of the Callaway County Ambulance District Board of Directors ("Board") after winning an election for the seat representing her subdistrict. Peeper's husband had worked as an emergency medical technician and supervisor for the Callaway County Ambulance District ("District") for two years at the time of Peeper's election to the Board. The District is a corporate body and political subdivision of the State of Missouri governed by the six-member Board. At the time of Peeper's election, the District and its employees were engaged in discussions over three major issues affecting their employment relationship: threatened litigation regarding overtime wages under the Fair Labor Standards Act; organization of the employees of the District for purposes of collective bargaining, and the schedule and hours worked by District employees.

Peeper attended her first meeting as a member of the Board on April 23, 1996. After conducting its routine business and election of officers, the Board adopted, over Peeper's objection, a resolution limiting Peeper's participation as a member of the Board. On May 28, 1996, the Board passed an amended resolution with the same goal. The resolution provided:

> [I]n order to comply with applicable law. and effectively prevent Christin[a] Peeper from using confidential information concerning the District for financial gain,. . . the undersigned board members desire and do hereby allow Christin[a] Peeper to participate in any District matter except she may not participate in discussion involving, or vote upon, any of the following:
>
> A. Legal actions, causes of action or litigation between the District and its employees and any confidential or privileged communication between the District or its representatives and its attorneys or legal work product;
>
> B. Hiring, firing, disciplining or promoting of particular employees by the District when personal information about the

employee, including information relating to the performance or merit of individual employees, discussed or recorded;

C. Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

D. Preparation, including any discussions or work product, on behalf of the District or its representatives for negotiations with employee groups;

E. Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, or alcoholism. or drug dependency diagnosis or treatment; and,

F. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent Christin[a] Peeper from hearing, participating in, or voting upon.

. . .[I]n order effort [sic] to comply with applicable law and effectively prevent Christin[a] Peeper from acting in matters that would result in a specific monetary benefit to

her or her spouse, that Christin[a] Peeper is directed to recuse herself and if she does not recuse herself she is prohibited from hearing, participating in, or voting upon the following:

A. Budgetary items involving the compensation, benefits, and ,pensions paid to employees;

B. The hiring, promotion, discipline, compensation benefits, and pensions of employees of the District; and

C. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which. the board may, by majority vote, decide to prevent Christin[a] Peeper from hearing, participating in, or voting upon.

(Jt. App. at 62-64). The Missouri conflict-of-interest law, to which the resolution refers provides, in part, that:

No elected or appointed official or employee. . .of any political Subdivision [of the state] shall:

. . .

(2) Use confidential information[1]

---

[1]Confidential information is defined as "all information ... which is of such a nature that it is not, at that time, a matter of public record or public knowledge." Mo. Rev. Stat. § 105.450(5)

> obtained in the course of or by reason of . . [her] official capacity in any manner with intent to result in financial gain for [her]self [or her] spouse. . .;
>
> (3) Disclose confidential information obtained in the course of or by reason of [her] ... official capacity in any manner with intent to result in financial gain for [her]self or any other person;
>
> (4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or [her] spouse . . .In all such matters such officials must recuse themselves from acting. . .

Mo. Rev. Stat. § 105.454 (1997) (footnote added). Board members expressed concern about their own potential criminal liability[2] in the event Peeper misused information she received as a member of the

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(1997).

[2]The Missouri conflict-of-interest law imposes criminal sanctions on any person who violate its strictures. The first knowing violation of the conflict-of-interest law constitutes a class by misdemeanor under Missouri law. Mo. Rev, Stat. § 105.478(1)(1997). A party committing a second offense under the law is guilty of a class D felony. Id. § 105.478(2).

Board.

Peeper protested the May resolution and filed a claim in federal court seeking injunctive relief based on her claim that the resolutions violated her rights under the First and Fourteenth Amendments to the United States Constitution and under the free speech clause of the Missouri Constitution. The district court denied Peeper's request for relief. The court held that the May resolution is "content-neutral," narrowly tailored to meet the significant government interests of preventing the appearance of government corruption and promoting the effective functioning of the District, and leaves open alternative channels of communication for Peeper. Id. at 6. The court further held that the May resolution conforms to the provisions of the Missouri conflict-of-interest law, specifically citing section 105,476 which provides, in part, that "nothing in [s]ections 105.450 to 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in [s]ections 105.450 to 105.498." Mo. Rev. Stat. § 105.476 (1997). The restrictions in the May resolution place limitations on Peeper that are not rationally related to the goals of Missouri conflict-of-interest law and that impinge on Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. Therefore, we reverse.

II.

We review the district court's conclusions of law de novo. United States v. Kistner, 68 F.3d 218, 220-21 (8th Cir. 1995). Our first task is to determine whether the challenged resolution deserves scrutiny that goes beyond that traditionally required for restrictions placed on candidates or officeholders. See Clements v. Fashing, 457 U.S. 937, 963 (1981). Where a regulation implicates a fundamental right, such as the First Amendment's free speech guarantee, we review the regulation under heightened scrutiny, Id. If no fundamental right is implicated, traditional equal protection principles apply. Id. Traditional equal protection principles dictate that state-imposed burdens that affect some citizens differently than others offend equal protection under the Fourteenth Amendment only if such a burden is "wholly irrelevant to the achievement of the [s]tate's [constitutional] objectives." McGowan v. Maryland, 366 U.S, 420, 425 (1961).

The district court examined the May resolution under the First Amendment strict scrutiny standard.[3] We disagree

---

[3]Strict scrutiny under the First Amendment dictates that a state may not restrict speech on a content basis unless it can show the restriction is narrowly tailored to serve a compelling state interest. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. ___, ___(1996).

that strict scrutiny applies to the limitations at issue. An individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office. Because of the analogous rights involved, we employ the same constitutional test for restrictions on an officeholder as we do for restrictions on candidacy. In reviewing candidacy restrictions, the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." Bullock v. Carter, 405 U,S. 134, 143 (1972). The Supreme Court has upheld restrictions on candidacy that are unrelated to First Amendment values and that "protect the integrity and reliability of the electoral process itself " See Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (citing Clements, 457 U.S. at 973 (upholding state provision prohibiting an incumbent Justice of the Peace from. seeking election to the state legislature)). To determine whether to uphold restrictions on candidacy, we first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" caused by *the* challenged restriction. Anderson, 460 U.S. at 789. Following that evaluation, we must:

> identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and the strength of each of

> those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id.

Following this process, we initially consider the injury caused by restrictions on the officeholder. As is the case with restrictions on candidacy, restrictions on an elected official's ability to perform her duties implicate the interests of two distinct parties: the individual's First Amendment associational rights and Fourteenth Amendment equal protection rights; and the voters' rights to be meaningfully represented by their elected officials. Cf. Bullock, 405 U.S. at 143 (1972) ("[T]he rights of voters and the rights of candidates do not always lend themselves to neat separation" when considering the effect of limitations on candidacy). Restrictions on a public official's participation necessarily, affect that individual's First Amendment associational rights and Fourteenth Amendment equal protection rights.[4]

---

[4]Limitations on an elected official's participation the proceedings of a public body such as the District also conceivably affect the official's First Amendment free speech rights, which would require us to apply strict scrutiny as Peeper suggests. Here, however, the May resolution only limits Peeper's participation as a member of the Board and does not limit her ability to vote for Board members, to speak before the Board during public comment periods, or to

Legitimate state interests may warrant restrictions that are de minimis limitations of the official's participation. See Clements, 457 U.S. at 972-73. Restrictions on an officeholder after election also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy.[5]

Although the district court upheld the May resolution applying the more rigid strict-scrutiny standard, we hold the resolution unconstitutional under rational-basis review The

---

otherwise express her opinions about the District's operation as any other citizen may under the First Amendment's free speech guarantee.

[5]Candidacy restrictions affect the voters' First Amendment right to be represented by reducing the pool of candidates, although voters have the opportunity to recruit other candidates to represent their viewpoints. See Plante v. Gonzalez, 575 F.2d 1119, 1126 (2d Cir. 1978) (requirements for candidacy are not unconstitutional unless they deny a cognizable group of citizens the night to meaningful representation through other candidates). Limitations on an officeholder, by contrast, provide voters no opportunity to be heard through an alternative representative. If the restrictions prevent the officeholder from meaningfully representing the voters who elected the official, such restrictions are subject to strict scrutiny. See Bullock, 405 U.S. at 143. Because Peeper does not raise the issue of the voters' rights, and because we hold the May resolution unconstitutional under the rational-basis test, we need not determine whether strict scrutiny applies.

resolution's provisions injure Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. The resolution creates a standard specific to Peeper that treats her differently than other Board members, strongly implicating her Fourteenth Amendment equal protection rights. The restrictions also restrain Peeper's interaction with other Board members, implicating her First Amendment associational rights.

Having determined that the resolution injures Peeper's First and Fourteenth Amendment rights, we evaluate the state's purported interests and whether the restrictions rationally serve those interests. The Board's stated interests are threefold: to prevent the misappropriation of information for personal gain; to prevent the appearance of impropriety; and to promote the free flow of ideas among members of the Board.[6] Each of these interests, if served, can at a minimum constitute a reasonable state interest. See, e.g., FEC v. National Conservative Political Action Comm, 470 U.S. 480,

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[6]Board members also expressed an interest in avoiding their own criminal liability for violations of the Missouri conflict-of-interest law that Peeper might commit. Yet, the statute requires a person to "knowingly" violate the conflict-of-interest law before that person is subject to criminal liability. Mo. Rev. Stat. § 105.478(1). The mere presence of Peeper in discussions that are not specific to her husband cannot constitute, knowledge of, much less the "aiding or abetting" of a violation of the statute on the part of other Board members.

500 (1985) (government's interest in avoiding corruption is compelling); Buckley v. Valeo, 424 U.S. 1, 27 (1976) (prevention of the appearance of corruption is a concern almost equal to the prevention of actual corruption); New York Times Co. v. Sullivan, 376 U.S. 270 (1964) (uninhibited, wide-open debate should be a "profound national commitment" and a "fundamental principle of the American government"). In this case, however, the portions of the resolution that restrict Peeper from participating in or even hearing discussions not directly related to her husband do not rationally relate to those interests.

The May resolution limits Peeper in a wide range of matters, most of which do not involve the concerns expressed by the Board or addressed by the conflict-of-interest law. For instance, the May resolution prevents Peeper from participating in discussions of or voting on "[l]egal actions, causes of action or litigation between the District and its employees" without a requirement that the topic be related to Peeper's husband's employment. Likewise, the resolution prevents Peeper from participating in discussions of hiring or firing employees or addressing testing and examination materials without regard to whether Peeper's husband is associated with the matters. The resolution goes well beyond the Missouri conflict-of-interest law's general prohibition of the misuse of confidential information for financial gain and recusal requirement for measures "designed . . .to provide a special monetary benefit" to the official or her spouse.

The Board's concern about keeping its discussions free-flowing, particularly during the Board's closed sessions, is based on its belief that Peeper's presence would chill discussions between other Board members. This chilling, the Board contends, stems from the other Board members' opinion that if Peeper is present she might pass on confidential information to her husband who would, in turn, pass it on to his Co-workers. It is incongruous, however, for a state to allow the election of people with such relationships to public office and then consider them less-trustworthy stewards of confidential information merely because of these relationships. The Missouri conflict-of-interest law prohibits any public official from misusing confidential information or acting, for self-benefit, and those with spouses employed by the public bodies they serve perhaps face greater temptations to run afoul of that prohibition. One does not however, face any additional temptation where the matters are unrelated to the official's spouse. Yet the May resolution prohibits Peeper from participating in any matter dealing with any employee's records, any testing material, or the hiring or firing of any employee. The Board's interest in preventing Corruption or at least the appearance of corruption is not served by the vast portions of the May resolution that go beyond matters that could not lead or appear to lead to corrupt behavior by Peeper. As such, those portions of the May resolution are not rationally related to the state interests cited by the Board.

Because provisions of the May resolution infringe

upon Peeper's constitutional rights under the First and Fourteenth Amendments without being rationally related to a legitimate state interest, the May resolution cannot stand as written.

III.

We reverse the decision of the district court. In light of our holding that the May resolution cannot stand as written, no injunctive relief is necessary.

A true copy.

Attest,

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER AND JUDGMENT
FILED, SEPTEMBER 27, 1996

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHRISTINA PEEPER,	)
Plaintiff,	)
	)
v.	) Case No.
	) 96 4228-CV-C-2
	)
CALLAWAY COUNTY	)
AMBULANCE DISTRICT,	)
Defendant.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Williamsburg, Callaway County, Missouri.

2. Defendant is a political subdivision of the State of Missouri organized pursuant to the provisions of Section 190.005 et seq. RSMo.

3. Defendant is a public, tax supported entity that provides ambulance services to the entire Callaway County, Missouri area.

4. Defendant is governed by a six member elected board presently consisting of Jean Benzen, Kathy Courtright, Steve Anderson, Cindy Smola, John Wheeler, and Plaintiff.

5. Plaintiff was duly elected a member of the board of directors on April 2, 1996 as a write-in candidate who received eight votes.

6. Prior to being elected, Plaintiff did not campaign for the position, did not have a platform, did not run in response to any issue confronting Defendant, and did not publicly espouse any view on any issue confronting Defendant.

7. Plaintiff is married to and resides with Joe Peeper, a full time employee of Defendant.

8. Plaintiff's husband is a supervisor and part of his duties include disciplining other employees.

9. After her election, Plaintiff received a memorandum from Defendant's executive director, calling to her attention the provisions of the Missouri Conflict of Interest Law.

10. Plaintiff attended her first board meeting of Defendant as an elected member on April 23, 1996.

11. At the April 23, 1996 board meeting of Defendant, a resolution was passed directed towards Plaintiff's involvement in specified board activities. ("Resolution #1").

12. The board operated under Resolution #1 for

the remainder of the April 23, 1996 meeting.

13. During the April 23, 1996 meeting, Plaintiff actively participated; she seconded two motions and was present during a closed session while a salary increase for the executive director was discussed.

14. By letter dated May 14, 1996, Plaintiff's attorney contacted Defendant expressing the following concerns regarding Resolution #1:

A. Enforcement of the conflict of interest laws was delegated to the Attorney General of the State of Missouri;

B. Information from which Plaintiff was excluded under the April 23, 1996 resolution could not properly be kept confidential under the provisions of Chapter 610 RSMo., the open meeting statute;

C. The resolution was broader than permitted under Chapter 105 RSMo.; and

D. Plaintiff had been prohibited from discussing certain matters of district-wide interest, including the change in hours of the employees.

15. As a result of such concerns, the board scheduled discussion of the resolution for its May 28, 1996 meeting.

16. An extended discussion concerning Plaintiff's presence during certain closed sessions of Defendant's meetings was held at the May 28, 1996 meeting of Defendant.

17. Plaintiff proposed that no resolution be adopted and Plaintiff be allowed to police her own activities with relation to the Missouri Conflict of Interest Law.

18. At the May 28, 1996 meeting the Defendant passed and adopted a superseding resolution, ("Resolution #2"), and rescinded Resolution #1.

19. Defendant operated under Resolution #2 during the remainder of its May 28, 1996 meeting and has operated under Resolution #2 since that time.

20. Resolution #2 addresses concerns raised by Plaintiff. It is couched in the terms of the open meeting statute. Section 610.021 RSMo.

21. At the May 28, 1996 meeting, while Defendant was operating under Resolution #2, Plaintiff actively participated; she made a motion, seconded another motion, and addressed the board during the employee and visitor comment portion of the meeting.

22. During the May 28, 1996 meeting, Plaintiff's husband addressed the board regarding the change in hours worked by employees. He did so during a scheduled agenda item where supervisors addressed Defendant and, further, during the employee and visitor comment portion of the meeting.

23. Plaintiff attended a June 11, 1996 special

meeting of the Defendant and was not precluded from participating in that meeting.

24. Prior to passage of Resolution #1, defendant was facing several issues, the outcome of which could affect Plaintiff and her husband financially. Those issues continue to the present.

25. In early 1996, an employee threatened to sue the district for overtime wages claimed to be due her.

26. By letter dated April 22, 1996, the president of the Missouri State Council of Fire Fighters, ("MSCFF"), threatened to sue Defendant for overtime wages purportedly owed employees.

27. Plaintiff's husband stands to gain financially if a suit against Defendant for overtime wages is successful, as he is among the class of employees who would receive an award.

28. A petition has been filed with the Missouri State Board of Mediation attempting to organize employees of Defendant into a collective bargaining unit.

29. The MSCFF seeks to include Plaintiff's husband in the bargaining unit.

30. A hearing was scheduled on the proposed collective bargaining unit before the State Board of Mediation on August 15, 1996. The status of that meeting is not known to the Court.

31. Inclusion of Plaintiff's husband within the proposed bargaining unit will affect Plaintiff and her husband

financially because the union will negotiate benefits and wages on behalf of the union members.

32. Defendant, at its April 23, 1996 meeting, voted to change the hours worked by its employees, an issue that had been pending before the board since 1994.

33. The change in hours worked by employees has affected Plaintiff's husband financially in that his hourly wage increased as a result of the change. 34. Plaintiff interprets the Missouri Conflict of Interest Law as prohibiting her from discussing only those board matters that specifically address her husband by name.

35. If given the opportunity, Plaintiff would attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization litigation and the determination of hours worked by employees.

36. If Plaintiff is allowed to participate in certain confidential board matters, the effective functioning of Defendant will be impaired because other board members will be reluctant to freely and openly discuss items of business with Plaintiff present during those discussions.

37. Plaintiff, while admitting that she is properly excluded from certain board discussions, is asking this Court to rescind Resolution #2 in its entirety.

38. Defendant is a statutory ambulance district and ultimately answers to the taxpayers of the District.

39. Defendant passed the resolutions to comply

with state law, to prevent the appearance of impropriety, and to preserve the effectiveness of the board.

40. The resolutions were not passed in response to or out of concern for any view, position, expression, or statements made by Plaintiff concerning any matter of public debate facing Defendant.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 42 U.S.C. Sections 1983, 1988, and 1367 and venue is appropriate.

2. Any issue concerning the propriety of Resolution #1 is moot, as such resolution was rescinded prior to the commencement of this action.

3. Resolution #2 is "content-neutral" as that term is used in first amendment jurisprudence, as it was not adopted due to any disagreement with the message conveyed by Plaintiff's speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). Indeed, Plaintiff never conveyed any message by her speech, even before adoption of the resolutions.

4. Resolution #2 is narrowly tailored to serve the significant governmental interests of preventing the appearance of government corruption and promoting the effective functioning of the political subdivision so long as Plaintiff's husband is employed in his present position with Defendant.

5. Resolution #2 leaves open ample alternative

channels of communication for Plaintiff. The resolution only prohibits her participation and discussion in certain limited, confidential board matters at board meetings where those items are discussed in closed session. The matters referenced in Resolution #2 should mandate the Plaintiff to voluntarily recuse herself but it is clear from her testimony that she would not do it voluntarily.

6. Because Resolution #2 is content-neutral, is narrowly tailored to serve significant governmental interests, and leaves open ample alternative channels of communication, the burden, if any, on Plaintiff's speech is justifiable as a reasonable time, place, and manner restriction. Ward, supra.

7. The cases holding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment are inapposite. Each of those authorities deals with the expressive content of a public official's speech, while Resolution #2 is not directed to the expressive content of Plaintiff's speech.

8. Further, even assuming arguendo that Resolution #2 impinges on Plaintiff's core political speech, it nonetheless survives first amendment scrutiny because it is narrowly tailored to further compelling interests of Defendant. Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 U.S. 37 (1983).

9. The interests of Defendant in preventing the

appearance of government corruption, in complying with the law, and promoting the effective functioning of government have been held to be "compelling". Buckley v. Valeo, 424 U.S. 1 (1976); Wrzeski v. City of Madison, Wis., 558 F. Supp. 664 (W.D. Wisc. 1983).

10. Resolution #2 is narrowly drawn to promote these compelling government interests. Resolution #2 deals only with confidential information (See Section 105.450(5) RSMo.) and information that would provide Plaintiff and her husband with a pecuniary gain. It substantially tracks the language of Section 610.021 RSMo. of the open meetings statute and Section 105.452 RSMo. of the conflict of interest statute.

11. Plaintiff's reliance on the "prior restraint" doctrine is misplaced. The authorities dealing with this doctrine routinely have to do with publication of speech by news media. Snepp v. U.S., 444 U.S. 507 (1980). However, even under the "prior restraint" doctrine, Resolution #2 is permissible because it survives the strictest first amendment scrutiny.

12. Resolution #2 complies with the provisions of the Missouri "Regulation of Conflict of Interest and Lobbying" Law, Section 105.450 RSMo. et. seq. Section 105.476 provides, in pertinent part, "... nothing in Sections 105.450 - 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in sections 105.450 - 105.498." To the

extent, if any, Resolution #2 establishes additional or more stringent requirements than Sections 105.450 et. seq. RSMo., they are expressly authorized by and in compliance with Section 105.476 RSMo.

13. Plaintiff has not established entitlement to injunctive relief because she has not prevailed on the merits. Defendant will be injured if the injunction is granted. The public interest strongly favors preventing the appearance of corruption. Dataphase Sys., Inc. v. C L Sys., Inc., Inc., 640 F. 2d 109, 114 (8th Cir. 1981) (en bane); Amoco Production Co. v. Gambell, 480 U.S. 531, 546 n. 12 (1987) (citation omitted).

ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's request for injunctive relief is denied and this case is dismissed. Each party to pay its own costs.

_____

Fernando J. Gaitan, Jr.
United States District Judge

Dated: SEP 27 1996
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

CHRISTINA PEEPER,	)
Plaintiff,	)
v.	) Case No.
	) 96 4228-CV-C-2
CALLAWAY COUNTY	)
AMBULANCE DISTRICT,	)
Defendant.	)

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's request for injunctive relief is denied and this case is dismissed. Each party to pay its own costs.

ENTERED ON: SEPTEMBER 30, 1996

September 27, 1996 R. F. Connor
Date Clerk

_____
(by) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER
FILED, OCTOBER 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3864WMJC

Christina Peeper,	*
Appellant,	*
	* Order Denying
	* Petition for
v.	* Rehearing and
	* Suggestion for
	* Rehearing En Banc
Callaway County	*
Ambulance District,	*
etc.,	*
Appellee.	*

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge Bowman, Judge Wollman, Judge Beam and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

October 29, 1997

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, Section 1 (1868)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. Section 105.450(5) (1994).

Definitions

As used in sections 105.450 to 105.498 and sections 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(5) "Confidential information", all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge;

Mo. Rev. Stat. Section 105.450(5) (1994).

Definitions

As used in sections 105.450 to 105.498 and sections 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(5) "Confidential information", all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge;

Mo. Rev. Stat. Section 105.452 (1994). Prohibited acts by elected and appointed public officials and employees

No elected or appointed official or employee of the state or any political subdivision thereof shall:

(1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or

employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse or dependent children, including but not limited to increases in retirement benefits, whether received from the state of Missouri or any third party by reason of such act. For the purposes of this subdivision, "special monetary benefit" means being materially affected in a substantially different manner or degree than the manner or

degree in which the public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected. In all such matters such officials must recuse themselves from acting and shall not be relieved by reason of the provisions of section 105.460, except that such official may act on increases in compensation subject to the restrictions of section 13 of article VII of the Missouri constitution; or

(5) Use his decision-making authority for the purpose of obtaining a financial gain which materially enriches himself, his spouse or dependent children by acting or refraining from acting for the purpose of coercing or extorting from another anything of actual pecuniary value.

Mo. Rev. Stat. Section 105.476 (1994). Applicability of other provisions of law--additional standards

Nothing in sections 105.450 to 105.498 shall be interpreted as exempting any individual from applicable provisions of any other laws of this state or the provisions of any charter or ordinance of other political subdivisions in the state, and nothing in sections 105.450 to 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in

sections 105.450 to 105.498.

Mo. Rev. Stat. Section 610.021 (1994). Closed meetings, records, and votes

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any minutes or vote relating to litigation involving a public governmental body shall be made public upon final disposition of the matter voted upon; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

(2) Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes or vote or public record

approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;

(3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body must be made available to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;

(4) The state militia or National Guard or any part thereof;

(5) Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

(6) Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores; however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

(8) Welfare cases of identifiable individuals;

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

(10) Software codes for electronic data processing and documentation thereof;

(11) Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid;

(12) Sealed bids and related documents, until the

bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such;

(14) Records which are protected from disclosure by law;

(15) Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest.

APPENDIX E

CALLAWAY COUNTY AMBULANCE DISTRICT

RESOLUTION

RESOLUTION

Now on this _____ day of _____, 1996, a majority of the board of the Callaway County Ambulance District ("the District"), by vote duly taken and recorded, hereby resolve as follows:

WHEREAS, Christine Peeper was duly elected to the board of directors of the District on April 2, 1996;

WHEREAS, Christine Peeper's husband, Joe Peeper, is a fulltime employee of the District;

WHEREAS, among the specific, statutorily mandated powers and duties of the District, pursuant to Section 190.060 RSMo, are to employ or enter into contracts for the employment of any person, firm, or corporation, and for professional services, necessary or desirable for the accomplishment of the objects of the District or the proper administration, management, protection or control of its property and to determine the type and amount of health, accident, disability and pension benefits for the salaried members of the organized ambulance district;

WHEREAS, Section 105.452 RSMo prohibits elected public officials, including board members of ambulance districts, from using or disclosing confidential information obtained in their official capacity with intent to result in financial gain for the official or the official's spouse and requires an elected public official to recuse when the board is considering any matter that is specifically designed so as to

provide a special monetary benefit to the official or the official's spouse;

WHEREAS, Section 105.478 imposes criminal liability for violations of Section 105.452 RSMo, the first violation being a B misdemeanor and any subsequent violation being a C felony;

WHEREAS, the undersigned board members are of the opinion many of the topics discussed by the board, including those listed more specifically below, involve confidential information that could result in financial gain or a special monetary benefit to Christine Peeper or her spouse, Joe Peeper;

WHEREAS, the undersigned board members are concerned about their potential criminal liability for aiding or abetting violations of Section 105.452 RSMo and do not want the interests of the District harmed by the use or disclosure of confidential information;

WHEREAS, the board has discussed potential litigation involving employees of the District; and,

WHEREAS, the board has previously, on April 23, 1996, passed a resolution regarding Ms. Peeper's participation in board matters and now desires to pass a new resolution to redefine and expand the scope of her involvement.

NOW, THEREFORE, be it resolved, in order to comply with applicable law and effectively prevent Christine Peeper from using confidential information concerning the District for financial gain, that the undersigned board

members desire and do hereby allow Christine Peeper to participate in any District matter except she may not participate in discussions involving, or vote upon, any of the following:

A. Legal actions, causes of action or litigation between the District and its employees and any confidential or privileged communications between the District or its representatives and its attorneys or legal work product;

B. Hiring, firing, disciplining or promoting of particular employees by the District when personal information about the employee, including information relating to the performance or merit of individual employees, is discussed or recorded;

C. Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

D. Preparation, including any discussions or work product, on behalf of the District or its representatives for negotiations with employee groups;

E. Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment; and,

F. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the

board may, by majority vote, decide to prevent Christine Peeper from hearing, participating in, or voting upon.

IT IS FURTHER RESOLVED, in order to comply with applicable law and effectively prevent Christine Peeper from acting in matters that would result in a specific monetary benefit to her or her spouse, that Christine Peeper is directed to recuse herself and if she does not recuse herself she is prohibited from hearing, participating in, or voting upon the following:

A. Budgetary items involving the compensation, benefits, and pensions paid to employees;

B. The hiring, promotion, discipline, compensation, benefits, and pensions of employees of the District; and

C. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent Christine Peeper from hearing, participating in, or voting upon.

IT IS SO RESOLVED.

/s/ Jean M. Benzen

/s/ John L. Wheeler

/s/ Cynthia Smola

/s/ Kathy Courtright

Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-1248

In The
Supreme Court of The United States
October Term 1997

CALLAWAY COUNTY
AMBULANCE DISTRICT
Petitioner,

v.

CHRISTINA PEEPER
Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether association rights and equal treatment rights may be the basis for an appellate decision where the civil rights claim was filed under 42 U.S.C § 1983 of First Amendment and Fourteenth Amendment violations, the claimant primarily argued theories of first amendment free speech and prior restraint, and the relevant facts fully support the appellate court decision?

2. Whether the District's Resolution should be sustained if it can be shown to have a "rational basis" or whether it must undergo a more rigid standard of review?

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42 U.S.C. § 1983 (1994). 1,8

STATUTES INVOLVED

The following statutory provision is involved in this case but not listed by Petitioner. The constitutional and statutory provisions listed by Petitioner are not repeated here.

42 U.S.C. § 1983 (1994).

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

Federal jurisdiction in the district court is based on Respondent's claim under 42 U.S.C § 1983 of violation of rights under the First and Fourteenth Amendments to the U.S. Constitution. (R. Apdx. B-3). The district court found the Callaway County Ambulance District's Resolution was "content-neutral," "narrowly tailored to serve significant governmental interests" with "ample alternative channels of communication, . . . justifiable as a reasonable time, place, and manner restriction," and denied all relief. (Pet.Apdx B-22,23,25). Respondent appealed. The 8th Circuit Court of Appeals reversed finding the Resolution void on its face. (Pet. Apdx A-1,-15).

Respondent disagrees with Petitioner's statement as a fact that "the only federal constitutional right alleged by Respondent to have been abridged by Resolution No. 2" was her "right to freedom of speech under the first amendment."

(Pet. at p.7). Respondent stated her claims as violations of her ". . . rights under the First and Fourteenth Amendments to the U.S. Constitution. . ." (R.Apdx B-3). Respondent prayed for relief ". . . from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes . . ." (R. Apdx. B-7). Petitioner was on notice from the very beginning that Respondent's claims were founded on the First and Fourteenth Amendments.

B. FACTUAL BACKGROUND

Respondent adopts the facts set forth by the 8th Circuit Appellate Court which accurately and concisely states the relevant facts. (Pet.Apdx A-2 through A-7).

Respondent disagrees with Petitioner's rendition of the factual background. Petitioner misstates the facts as follows:

> * * * "During the May 28, 1996 meeting, there was an **extended discussion** concerning Respondent's **presence during certain closed sessions** of the ambulance district's board meetings." (Pet. at p. 5). (emphasis added)

At the meeting, Petitioner read a prepared revised resolution substantially excluding Respondent from discussing or voting on any matter touching on employees, without limit as what employee or what type of board meeting. (Pet. Apdx E-38). Respondent's attorney objected to the whole resolution as over broad and unnecessary. Petitioner's

characterization of the facts leaves a false impression that the Resolution applied only in a limited manner to some closed sessions. On its face, the Resolution is not so limited to avoid constitutional violations.

> "The Respondent **actively participated** at the April 23, 1996 meeting. * * * Respondent **actively participated** at the May 28, 1996 meeting. * * *" (Pet. at p 5).

Petitioner prevented Respondent from "actively participat[ing]" at meetings prior to trial, permitting only a severely limited participation. (Tr. 6-10; 12-16).

> * * * "The Respondent was **not entirely precluded** from participating during a **June 11 1996 meeting** of the ambulance district she attended." (Pet. at p.6).

The June 11, 1996 meeting was a fourteen minute special meeting where the only item discussed was repair of an ambulance damaged in an auto accident. (Jt.Apdx p. 150). Respondent fully participated without being excluded.

> "**The [employee law]suit was was (sic) filed thereafter and Respondent's husband is a plaintiff therein.** * * * The Missouri State Council of Firefighters sought to include Respondent's husband in the bargaining unit and **he was subsequently included in the bargaining unit.**" (Pet. at p.6).

At trial, the employee lawsuit about unpaid wages had not been filed; Respondent's husband was not a plaintiff; nor was he a member of the union because it had not yet been

formed. These are not facts supported by the record.

> "Respondent's interpretation of the Missouri conflict of interest law is such that she deems it prohibits her from discussing **only those matters that specifically address her husband by name. Given the opportunity, Respondent will attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization, litigation by her husband against the ambulance district, and determination of hours worked by employees (including her husband)**. (Pet. at p 6).

Petitioner misstates Respondent's testimony about her understanding of the conflict of interest law. Her testimony indicates she knew she could not "use or disclose confidential information that would be of special monetary benefit to [her] or [her] husband, or do something that would be of special monetary benefit to [herself] or [her] husband," (Tr. p. 17) or, "be present during discussions about litigation where she or her husband were parties." (Tr. p. 21). Respondent never stated she believed the conflict of interest only applied to matters that address her husband by name.

Petitioner states as a foregone conclusion Respondent will violate the conflict of interest law. The evidence does not support Petitioner's conclusory statement. The trial record shows Respondent never indicated an intent to violate

the conflict of interest law, much less to actually engage in a violation. (Tr.p. 17, 21-30). The record does not demonstrate one concrete instance in which Respondent attended, participated in or voted on matters of special monetary benefit affecting her and her husband financially, whether about the union organization, litigation by her or her husband against the district, or hours worked by employees including her husband. (Tr. p. 50, 58). At the time of trial, Respondent had attended three regular and one special meeting, yet Petitioner cannot point to any violation of the conflict of interest law by Respondent. On the other hand, Petitioner admitted that it allowed its director to attend a closed confidential board meeting on the union organization issue when his wife is a paramedic employee of the district, may be included within the bargaining unit, and did not, by resolution or otherwise, prohibit his attendance. (Tr. p. 60).

REASONS FOR DENYING THE PETITION

The general rule that "courts of appeal will not consider issues not raised below," argued by Petitioner, does not apply for two reasons. First, the Eighth Circuit Court of Appeals has discretion to render a decision on claims properly before it based on the applicable established law relevant to the facts regardless of the legal arguments offered by the parties. Secondly, this case falls squarely within the exception, where appellate courts have discretion in exceptional cases to reach new issues in order to render justice.

A. APPELLATE COURT DISCRETION.

Federal appellate courts retain the "independent power to identify and apply the proper construction of governing law" to claims, regardless of either parties' legal theories. **U.S. Nat. Bank of Ore. v. Ins. Agents**, 508 US 439, 446, 124 L Ed 2d 402, 413, 113 S Ct 2173 (1993). The matter of what questions an appeals court may take up and consider is left primarily to the discretion of the courts of appeals. **Singleton v. Wulff**, 428 US 106,121, 49 L Ed 2d 826, 837, 96 S CT 2868 (1976). This Court has recently stated the perimeters within which an appellate court operates to correct lower court errors. **United States v Olano**, 507 US 725, 732-37 (1993). Petitioner does not argue here that this court should revisit **Olano**, but that this Court should supervise the 8th Circuit Appeals Court in its application of principles already well established. The 8th

Circuit is well aware of review principles applicable to civil rights claims. **Families Achieving Independence and Respect v Nebraska Department of Social Services**, 111 F.3d 1408, 1410 (1997).

(a) CLAIM PROPERLY BEFORE COURT.

(i) FREEDOM OF ASSOCIATION INSEPARABLE ASPECT OF FIRST AND FOURTEENTH AMENDMENT.

It is well beyond debate that freedom of association is a close nexus to freedom of speech and "is an inseparable aspect of the `liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." **N.A.A.C.P. v. Alabama**, 357 US 449, 460, 2 L Ed 2d 1488,1498, 78 S Ct 1163 (1958); **Republican Party of Arkansas v. Faulkner County**, 49 F.3d 1289, 1292 (8th Cir. 1994). Freedom of association is a peripheral First Amendment right not expressly included in the First Amendment. The existence of association as a form of expression necessary to make the express guarantees fully meaningful is settled law. **Griswold v. Connecticut**, 381 US 479, 483, 14 L Ed 2d 510, 514, 85 S Ct 1678 (1965).

(ii) PETITIONER MISSTATES THE RECORD ABOUT RESPONDENT'S CLAIMS AND ARGUMENTS BEFORE THE LOWER COURTS.

Petitioner claims the 8th Circuit based its opinion on claims not before the court at all. This is not a fair or

correct statement. In her complaint, Respondent invoked federal jurisdiction under 42 USC § 1983 based on violations of her civil rights protected by the First and Fourteenth Amendments to the U.S. Constitution. (R. Apdx B-3). Respondent requested relief "from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes on matters pertaining to Defendant's employees . . ." (R. Apdx B-7). From the very beginning the claim was before both lower courts.

The right of association is included within the Respondent's broader claim of Freedom of Speech expression rights guaranteed by the Fourteenth Amendment due process equal protection. The 8th Circuit merely fine tuned its holding to a narrower aspect of the Respondents initial and continuing claim that her First and Fourteenth Amendment rights were violated. Association and equal protection rights were not new claims within the preclusion rule, but a different aspect or argument to support what was always Respondent's consistent claim; that Petitioner violated Respondent's civil rights protected by the First and Fourteenth Amendments. **Lebron v. National R. Passenger Corp.**, 513 US 374, 130 L.Ed 2d 902,909-10, 115 S Ct 961 (1995) (appellate discretionary review of dispositive governmental entity issue expressly disavowed in both lower courts and first argued in brief before Supreme Court). The Complaint stated the claims clearly and were

properly before the lower courts. (K.Apdx B-3,7).

In her trial brief, Respondent relied most heavily on arguing First Amendment free speech and the doctrine of prior restraint, but prayed for relief on her "constitutional rights of free speech and association." (R.Trial Brief,p 8). Before the appeals court, Respondent summarized her position as:

> ". . . that appellee's resolution prohibiting her from discussing and voting upon virtually all matters concerning district employees, despite her being a co-equal member of the board of directors, constitutes a continuing violation of her First Amendment rights of speech and expression as protected by the Fourteenth Amendment of the U.S. Constitution far in excess of any legitimate justification under Missouri conflict of interest statutes." (Appellant's Opening Brief, at p.1).

Throughout her brief, Respondent argued she was singled out for different treatment from her co-equal board members, yet the other directors were not subject to the Resolution's blanket prohibitions about many employee matters unrelated to Respondent or her husband, implicating Fourteenth Amendment equal protection upon which the appellate court based its holding. (Appellant's Opening Brief, p. 30-36; P. Apdx A-7).

Petitioner did not address Respondent's argument she was being treated differently from her co-directors in broad

areas not related to her or her husband's employment and not related to any financial gain, arguing instead the Resolution was adopted for "compelling reasons" and was "narrowly drawn." (See generally, Brief of Appellee). Petitioner's choice of legal argument does not prevent the appeals court from addressing the claim. Petitioner had full opportunity to present evidence at the bench trial and argue its legal theories before both lower courts. The appellate court acted well within its prudential discretion. The Writ should be denied.

(b) JUSTICE DICTATED THE EXCEPTION APPLY.

In addition, but not because the claim is precluded, this case falls within the exception, where appellate courts have discretion in exceptional cases to reach new issues in order to render justice. **Singleton v. Wolf**, 428 US 106, 121, 96 S Ct 2868, 2877-78; 49 L.Ed 2d 826 (1976) (where "proper resolution beyond any doubt" or "injustice might otherwise result"). One need only read the Resolution, and the 8th Circuit opinion in contrast to the District court opinion to realize that the proper outcome is not in doubt. The Resolution is simply not reasonable in the many areas as stated by the 8th Circuit. Without question, injustice would result if a void and unconstitutional board resolution be allowed to operate against Respondent. **Turner v. City of Memphis**, 369 U S 350, 353, 7 L Ed 2d 762, 764-5, 82 S Ct 805 (1962) (relief against discrimination clear under

prior decisions and undisputed facts; Tenn. Statutes inconsistent with Fourteenth Amendment); see also, **Hormel v. Helvering**, 312 U S 552, 557, 85 L Ed 2d 1037, 1041 (1941) (procedural rules do not defeat justice).

Clearly, justice demands relief from a void and discriminatory district board resolution. This case falls outside the general rule because the claim was properly before both lower courts, but, additionally, within the exception because injustice would otherwise result. After reading the condensed arguments in the Petition and Response, the opinions below and the Resolution, this court can reasonably conclude there is little doubt as to how this case will be decided. The Petition for Writ of Certiorari should be denied because the 8th Circuit rendered justice.

II. THE EIGHTH CIRCUIT DECISION NOT ERRONEOUS.

Petitioner argues that the standard of review should be "strict scrutiny" not the "reasonable basis" test used by the 8th Circuit. (Pet. p. 27). This is not a reasonable argument. If Petitioner could not show the 8th Circuit why it is not necessary to relate the prohibited matters to the state interests cited by the Board, it is highly unlikely that Petitioner could convince this Court under a higher degree of scrutiny that the Resolution need not be "narrowly tailored" or rationally related. The lower "reasonable basis" standard is to Petitioner's advantage and should not be grounds for granting a Writ of Certiorari.

Regardless of the level of scrutiny, Petitioner cannot achieve its objectives by totally arbitrary means. The criterion for different treatment must bear some relevance to the object of the resolution. **Bullock v. Carter**, 405 US 134, 145, 31 L Ed 2d 92, 101, 92 S Ct 849 (1972). Petitioner was unable to show how participating in discussions or voting on "legal actions, causes of action or litigation between the District and its employees" without a requirement that the topic be related to Respondent's husband's employment is relevant to conflict of interest law, or preventing the appearance of corruption. Petitioner was thoroughly questioned during oral argument before the 8th Circuit panel about the "narrowly tailored" and "reasonably related" areas, but did not persuade the appellate court

judges to accept his viewpoint.

Petitioner argues for the first time here that the district has a compelling interest in "maintaining the propriety and fairness of financial matters affecting its employees" and the Respondent's mere presence "creates the appearance of unfairness to other ambulance district employees and among the general public." (Pet. p. 19). "Fairness of financial matters" is not stated as a concern in the Resolution. No evidence about this state interest was offered at trial, yet Petitioner argues this is a compelling interest that has been adjudicated. (Pet. p. 19). This is not a persuasive argument. Following this reasoning, no board member could have any relationship with an employee, whether a familial, social, or business interest, without creating an objectionable atmosphere of unfairness by their mere presence, yet other board members would not be subject to this Resolution.

The 8th Circuit did find the Petitioner had some reasonable state interests "to prevent the misappropriation of information for personal gain, to prevent the appearance of impropriety and to promote the free flow of ideas among members of the board;" but rejected the Petitioner's concerns about avoiding accessory criminal liability. (P.Apdx p A-12). However, the 8th Circuit could not, under the reasonable basis test, find that the Resolution was narrowly drawn to achieve those stated interests. Nor could the court find that many matters were rationally related to

the stated purposes. (Pet.Apdx p A-13 - A-15).

The Resolution is not "narrowly tailored" because it fails to limit its burden to matters about Respondent or her husband's employment. For example, "the Resolution prevents Respondent from participating in discussions of hiring or firing employees or addressing testing and examination materials without regard to whether Respondent's husband is associated with the matters." (Pet. Apdx A-13). The Resolution prohibited Respondent from receiving or discussing information about the performance or merit of individual employees without regard to whether the information relates to Respondent's husband's employment. (Pet. Apdx E-38). The Resolution also prohibited Respondent from discussing or voting upon matters about individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, alcoholism or drug dependency diagnosis or treatment. (Pet. Apdx E-38). Unless discussing or voting upon those matters involved her husband, Respondent would have no means to obtain financial gain for herself or her husband. Unless those areas pertained to her husband, Respondent was in no different posture than her co-equal board members.

Petitioner argues the 8th Circuit should have focused on "whether the district's goals are furthered by Resolution No. 2, and not whether each specific subsection of

Resolution No. 2 precisely, and without deviation therefrom, promotes a corresponding explicit goal or specific subsection of the conflict of interest law." (Pet. p. 28). Petitioner misunderstands the concept that the Constitution is a limit on governmental actions, not a grant of power to do whatever is necessary to further its "goals."

The broad prohibitions not directly or indirectly related to Respondent's husband are not "narrowly tailored." Because those "vast portions of the May resolution that go beyond matters that could not lead or appear to lead to corrupt behavior by Peeper," are not "narrowly tailored" nor "rationally related," the Resolution infringes Respondent's First and Fourteenth Amendment rights. (Pet. Apdx A-14).

Petitioner simply does not agree with the result and now wants to reargue its original legal theory here by claiming the decision is erroneous. The Writ should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES

42 U. S. C. SECTION 1983 (1994)

42 U.S.C. SECTION 1983 (1994).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHRISTINA PEEPER,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 96 4228-CV-C-2
	)	
CALLAWAY COUNTY	)	
AMBULANCE DISTRICT,	)	
a political subdivision	)	
of the State of Missouri,	)	
Defendant.	)	

COMPLAINT

COUNT I

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF UNDER 42 USC § 1983

The plaintiff, by counsel, for her cause of action against defendant states the following:

1. Plaintiff is a citizen and resident of Williamsburg, Missouri, located in Callaway County, within

the state of Missouri.

2. Defendant is a body corporate and political subdivision of the State of Missouri, organized pursuant to the provisions of §§190.005 - 190.085 of the Revised Statutes of Missouri, and is capable of bringing suit and being sued as such pursuant to section 190.010 RSMo.

3 This Court has jurisdiction to hear and determine this Complaint pursuant to 42 USC § 1983 and 42 USC § 1988, in that the conduct of Defendant complained of herein violated and continues to violate Plaintiff's rights under the First and Fourteenth Amendments to the U.S. Constitution as more specifically enumerated in this Complaint. Further, Plaintiff respectfully invokes this Court's jurisdiction pursuant to rule 18(A) F.R.C.P. and 28 U.S. C § 1367 to hear and adjudicate ancillary's state law claims set forth in Count II of this Complaint.

4. Venue lies in this court and is proper because Plaintiff resides in the geographic boundaries of the district and division where this suit is filed and Defendant is organized and is operated within the same geographic boundaries.

5. Defendant is governed by a six-member board of directors whose powers are defined by §§ 190.055-190.060 RSMo.

6. On or about April 2, 1996, Plaintiff was elected to Defendant's board of directors by write-in ballot, and shortly thereafter were [sic] duly sworn into office.

7. At the time of plaintiff's election and taking office, Defendant's board of director consisted of Jean Benzene, Kathy Courtright, Steve Anderson, Cindy Smola and John Wheeler as well as the plaintiff. Under the ambulance district law as above cited, no distinctions are made between the power of authority of members of the Board of Directors.

8. On April 23, 1996, Plaintiff attended her first meeting of the board of directors. At that meeting, after conduct of routine business and election of officers, the board of directors, through vote of Steve Anderson, John Wheeler, Cathy Courtright and Cynthia Smola, passed a resolution pertaining to Plaintiff, the text of which is set forth in Exhibit #1, attached hereto and incorporated herein by reference.

9. The substance of the resolution shown on Exhibit #1 was that Plaintiff, due to her marriage to a person who is employed as an emergency medical technician with the Defendant district, was barred from all meaningful participation and discussion involving the business of the [sic] to be conducted by the board of directors and was barred from voting upon substantive matters of the board of directors, all as described in said resolution. Prior to passage of said resolution, Plaintiff objected to the resolution as over broad and unnecessary.

10. Plaintiff has never violated any provision of § 105.452 RSMo., being a section of the state conflict of

interest laws, nor has Plaintiff any intent to violate such statute. Notwithstanding the foregoing, Plaintiff was barred from active discussion concerning issues of public concern in her capacity as a member of the board of directors at the April 23, 1996, meeting of the board of directors, and from voting on all matters except the most mundane of business. Thereafter at the next regularly scheduled meeting of the Board of Directors held on May 28, 1996, Plaintiff attended and once again made objection to her being prohibited from participating in discussions on matters of pubic concern to which she was entitled to participate as a member of the board of directors and from voting thereon. At this meeting and after lengthy discussion, a majority of the members of the board of directors then present by majority vote passed a second resolution shown in Exhibit #2 and attached hereto and incorporated herein by reference. The substance of this resolution was to permit Plaintiff to participate in all discussions and votes of board of director's business, except those pertaining to employees. Plaintiff likewise objected to the necessity of this resolution.

11. The actions of Defendant through its board of directors in passage and enforcement of Exhibits #1 and #2, constitute a violation of Plaintiff's right to the free exercise of speech and expression protected under the First Amendment of the U.S. Constitution made applicable to political subdivisions of the State of Missouri through the Fourteenth Amendment of the U.S. Constitution.

12. The passage and enforcement by Defendant of Exhibits #1 and #2 against Plaintiff constitutes a prior restraint on Plaintiff's free exercise of her right of speech and expression and to cast a vote in her capacity as a duly elected member of the board of directors of Defendant because no judicial determination has been made that Plaintiff's exercise of her free speech rights and voting rights as a member of the board of directors do not qualify for protection under the First and Fourteenth Amendments to the U.S. Constitution.

13. Plaintiff is suffering irreparable harm from being deprived by Defendant to the free exercise of speech and expression by participating in discussion amongst the board of directors on issues of public concern pertaining to the governance, operation and management of Defendant in relation to its employees, and from being prohibited from voting on matters thereon.

14. Plaintiff has no adequate remedy at law and Defendant should be enjoined from enforcement of Exhibit #2 and passage of any further orders, resolutions or ordinances restraining Plaintiff's free exercise of her rights of speech and expression in discussing matters of public concern as a member of the board of directors and from exercising her right to vote thereon.

WHEREFORE, Plaintiff prays the Court to issue a preliminary and permanent injunction prohibiting Defendant from enforcing the resolutions contained in Exhibits #1 and

#2, and from prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself through public discussion and votes on matters pertaining to defendant's employees, for an order awarding her attorney fees, litigation expenses and costs as permitted by law, and for such orders of relief as the Court deems just and proper.

COUNT II

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO CHAPTER 536 RSMO

The plaintiff by counsel for her cause of action under Count II of this complaint states the following:

1. The plaintiff realleges and incorporates by reference all allegations made in Count I hereof as if fully set forth verbatim.

2. In addition to and not in lieu of the relief sought under Count I of this Complaint, plaintiff seeks declaratory and injunctive relief pursuant to §§ 536.140-.150 RSMo as authorized under by [sic] rule 18 (A) F.R.C.P. and 28 USC § 1367.

3. The court should declare the adaption [sic] of Exhibits 1 and 2 unlawful and enjoin enforcement thereof for the following reasons:

a.) The adaption [sic] and enforcement of Exhibits 1 and 2 by defendant against plaintiff is unconstitutional in application because it violates the

First and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Missouri Constitution 1945.

b.) The adaption [sic] and enforcement of Exhibits 1 and 2 by Defendant against Plaintiff is in excess of defendant's statutory authority and jurisdiction in that no provision of §§ 190.005-.190.085 RSMo, the Ambulance District Law, authorizes or empowers the board of directors of an Ambulance District to place restraints upon board of director member speech or voting rights to enforce or prevent violation of § 105.454 RSMo, and by virtue of § 105.472 RSMo. only the Attorney General of the state of Missouri is empowered to investigate and prosecute complaints of violations of the Missouri Conflict of Interest law.

c.) The adaption [sic] and enforcement of Exhibits 1 & 2 by Defendant against Plaintiff was arbitrary, capricious, unreasonable, involved an abuse of discretion, was made without lawful procedure, and was without authority of law because Plaintiff has not violated any provision, has no intent to violate such law and the members of the board of directors voting to enact Exhibits 1 & 2 had and have no factual cause or legal basis to do so with the result of restraining Plaintiff's rights to participate in discussions at meetings and exercising her voting

rights.

4. Plaintiff is without adequate remedy at law and suffers irreparable harm due to Defendant's adaption [sic] and enforcement of Exhibits 1 & 2 and the Court should declare said resolutions unlawful and enter preliminary and permanent injunctive relief prohibiting Defendant through its governing body from enforcing Exhibit #2 and passage of any ordinance, order, or resolution, restraining defendants [sic] participation in discussions and exercising her right to vote as a member of Defendant's Board of Directors.

WHEREFORE, Plaintiff prays the Court to declare Exhibits 1 & 2 unlawful and unenforceable, to issue a preliminary and permanent injunction prohibiting Defendant from enforcing the resolutions contained in Exhibits #1 and #2, to award Plaintiff her attorney fees and costs, and to enter such other orders and relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

s/s John L. Patton
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Attorney for Plaintiff

EXHIBIT 1, **RESOLUTION** dated April 23, 1996 is not set out here because it was not considered by either

lower court, thus is not involved in this case.

Exhibit 2, **RESOLUTION** dated May 28, 1996, is set forth in Petition for Writ of Certiorari, Appendix E p 36-39.

(3)

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

Nº. 97-1248

In The

Supreme Court of The United States

October Term 1997

CALLAWAY COUNTY
AMBULANCE DISTRICT

Petitioner,

v.

CHRISTINA PEEPER

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF OF PETITIONER

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The Court of Appeals Improperly Decided the Case on Issues not Raised in the District Court or on Appeal

The Eighth Circuit found that Petitioner violated Respondent's first amendment associational rights and her fourteenth amendment equal protection rights although Respondent never asserted, at trial or on appeal, violations of those rights. Instead, Respondent consistently claimed only a violation of her right to free speech under the first amendment. In her Brief in Opposition, Respondent contends for the first time that she actually raised a violation of her associational rights, quoting the conclusion of her trial brief and its reference to "constitutional rights of free speech and association". (Respondent's Brief in Opposition at p. 9) This lone reference to associational rights, buried in what amounts to a prayer for relief, does not amount to an actual argument that her associational rights were violated.

Perhaps the fleeting nature of the quoted reference caused Respondent to forget she had made it. In her Appellant's Suggestions in Opposition to Petition for Rehearing En Banc filed in the Eighth Circuit, (which Petition was denied by a 6-5 vote), Respondent did not claim she had asserted a violation of her associational rights in response to Petitioner's argument that such was not a proper basis for relief. Indeed, Respondent acknowledged more than once that she had not raised such a claim.

"While it is true that Peeper characterized the First amendment violations of speech and expression rights..."

(Suggestions in Opposition to Petition for Rehearing, p.4) "Although appellant has argued on appeal that the infringements of resolution #2 violate her First and Fourteenth Amendment rights of speech and expression, the fact that this Court determined that the First Amendment violation was in the nature of a violation of her association rights or her fourteenth Amendment rights of equal protection does not offend the precedent..." (Suggestions in Opposition to Petition for Rehearing, p. 5) The quoted passages confirm that Respondent has acknowledged she never contended Petitioner's actions violated her associational or equal protection rights.

Likewise, Respondent did not assert a violation of her associational or equal protection rights in her complaint. She alleged that Petitioner did "violate Plaintiff's rights under the First and Fourteenth Amendments to the U.S. Constitution as more specifically enumerated in this Complaint." (R.Apdx B-3, paragraph 3) Respondent "enumerated" as follows: "11. The actions... constitute a violation of Plaintiff's right to the free exercise of speech and expression protected under the First Amendment of the U.S. Constitution made applicable to political subdivisions of the State of Missouri through the Fourteenth Amendment of the U.S. Constitution... 12... a prior restraint on Plaintiff's free exercise of her right of speech and expression... 13... deprived by Defendant to the free exercise of speech and expression 14... restraining Plaintiff's free exercise of her rights of speech and expression...

WHEREFORE, Plaintiff prays the Court to issue... injunction... prohibiting Defendant from... prohibiting Plaintiff from exercising her rights under the First and Fourteenth Amendments to freely express herself". (R.Apdx. B-5 through 7)

Respondent also asserts that, even if she did not raise the issues of associational and equal protection rights, the Eighth Circuit was nonetheless justified in deciding the case on those issues, citing U.S. Nat. Bank of Or. v. Independent Ins. Agents, 508 U.S. 439 (1993) and U.S. v. Olano, 507 U.S. 725 (1993). Neither decision of this Court is of any assistance to Respondent.

The U.S. Nat. Bank case involved a situation in which the Comptroller of the Currency interpreted a statutory provision, "section 92". The Court of Appeals, recognizing that there was some authority for the proposition that section 92 had been repealed, ordered the parties to file supplemental briefs directed to the issue of section 92's continued vitality, and decided the statute had been repealed. U.S. Nat. Bank at 441-446. Thus, the issue raised by the parties before the Court of Appeals in U.S. Nat. Bank was the proper interpretation of a statute and the issue raised sua sponte by the court was whether the statute existed as good law.

In holding that the Court of Appeals had properly decided the question, though not raised by the parties, this Court noted that the issue was "antecedent to... and ultimately dispositive of the dispute before it". U.S. Nat. Bank at 447.

That contrasts with the decision of the Eighth Circuit in ruling this case on different constitutional grounds than those raised by Respondent. The Court also placed great importance on the fact that, by ordering supplemental briefing and raising the issue at oral argument, the Court of Appeals gave "the parties ample opportunity to address the issue" before deciding the case on that basis. U.S. Nat. Bank at 448. The Eighth Circuit gave Petitioner no such opportunity in this case.

Respondent is apparently operating under the assumption that U.S. v. Olano, supra, is controlling precedent as to the issues raised by the Petition for Writ of Certiorari herein. "Petitioner does not argue here that this court (sic) should revisit Olano". (Brief in Opposition, p.6) Respondent is absolutely correct that Petitioner does not urge reversal of Olano. The case dealt with the standard of appellate review in a criminal matter and hinged on interpretation of the "plain error" standard of Federal Rule of Criminal Procedure 52(b). Olano at 731,732. Petitioner does not attack Olano because Petitioner can discern no way in which Olano is remotely relevant to this case.

Petitioner has not Misstated the Record

At several places in her Brief in Opposition, Respondent accuses Petitioner of misstating the record below. As shown above, Petitioner has not misled this Court as to whether Respondent raised the issues of a violation of her

associational or equal protection rights. Respondent did not raise the issues, contrary to the assertions contained in her Brief in Opposition at pages 7 through 10.

Likewise, Respondent states that Petitioner has not accurately stated the facts with regard to discussions that were had prior to adoption of Resolution #2 at Petitioner's board meeting on May 28, 1996, and with regard to the extent of Respondent's participation in Petitioner's meetings on April 23, 1996, May 28, 1996, and June 11, 1996, while Petitioner was operating under one or the other of the resolutions it passed. (Brief in Opposition, pp. 2-3) However, Petitioner states the facts simply as they were found by the district court. Concerning the discussion had prior to passage of Resolution #2 at the May 28, 1996, meeting, Petitioner's statement is taken from the district court's Finding of Fact number 16. (Apdx. B-19) As to the extent of Respondent's participation in meetings, the facts as stated by Petitioner were found by the district court at Findings of Fact 13, 21 and 23. (Apdx. B-18, 19, 20)

Respondent also asserts that Petitioner "misstates Respondent's testimony about her understanding of the conflict of interest law." (Brief in Opposition, p. 4) Again, Petitioner has simply stated the facts as found by the district court. The statements Respondent complains of in this regard are taken from the district court's Findings of Fact 34 and 35. (Apdx. B-21)

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted.

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